No. 14-114

IN THE

Supreme Court of the United States

DAVID KING, ET AL.,
Petitioners,
v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS*

Amicus, The American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amici, *e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), addressing a variety of constitutional law issues.

Amicus files this brief because it wishes to highlight the separation of powers concerns raised by the IRS regulations at issue in this case.

SUMMARY OF THE ARGUMENT

In extending tax-subsidies to purchasers of health insurance coverage on federally established exchanges, the IRS regulations rewrite a core provision of the Patient Protection and Affordable Care Act ("ACA"), without which the law would not have passed, in a direct assault on the separation of

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* Counsel for Petitioners and for Respondents have filed with the Court blanket consents to the filing of amicus curiae briefs in this case. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

powers. Authorizing the expenditure of hundreds of billions of dollars in subsidies, as well as billions in penalties against employers and individuals, the regulations were promulgated with virtually no concern for Congressional intent or the plain meaning of § 36B.

The IRS regulations were promulgated notwithstanding the Administration's own "indispensable expert's" recognition that the law limited tax subsidies to insurance coverage purchased on state-established exchanges.

The regulations are the most egregious example of the Administration's make-it-up-as-we-go approach to implementing the ACA. They eviscerate the ACA's goal of encouraging state participation and promote the federalization of this nation's healthcare in direct contravention of Congress's intent.

ARGUMENT

I. THE IRS REGULATIONS ARE PART OF THE ADMINISTRATION'S ONGOING EFFORT TO REWRITE OR SUSPEND PORTIONS OF THE ACA, IN VIOLATION OF THE SEPARATION OF POWERS.

For the reasons set forth in Petitioner's Brief, the statutory language of IRC Section 36B is unambiguous that federal tax credit subsidies are available only for health insurance coverage

purchased through an "Exchange established by the State." 26 U.S.C. § 36B. The Administration's attempt to rewrite statutory language through administrative fiat does great violence to the separation of powers.

A. The Separation of Powers Was Intended To Prevent The Executive Branch From Dictating National Policy by Administrative Fiat.

The IRS regulations [1] significantly amend the ACA, and "there is no provision in the Constitution that authorizes the President to enact, to amend, or to [r]epeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). "Repeal of statutes, no less than enactment, must conform with Art. I," *INS* v. *Chadha*, 462 U.S. 919, 954 (1983), and may be exercised only through the "single, finely wrought and exhaustively considered [legislative] procedure." *Clinton*, 524 U.S. at 439-40 (quoting *Chadha*, 462 U.S. at 951).

Last term alone, this Court twice held invalid administrative agency regulations that ignored or exceeded Congressional authorization. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (stating "[w]ere we to recognize the authority claimed

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[1] 26 C.F.R. § 1.36B-2; 45 C.F.R. § 155.20.

by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers" and noting that administrative agencies do not have the power to "revise clear statutory terms that turn out not to work in practice"); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) (administrative agency discretion does not encompass the authority to "disregard clear language simply" because the agency asserts that "Congress 'must have intended' something" other than what the statute's text actually says).

Like the IRS regulations in this case, administrative agency decisions to spend taxpayer funds wholly independent of Congressional authorization rend the very fabric of separation of powers and threaten the liberty of all citizens. "Money is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints." *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring).

B. The IRS Regulations Were Promulgated with No Effort By IRS and Treasury Officials to Properly Interpret the Plain Language of §36B.

The history of the promulgation of the IRS regulations reveals an Administration more concerned with accomplishing its policy goals than

with properly implementing the ACA as written and adopted by Congress. An investigative report published by the House of Representatives Committees on Oversight and Government Reform and Ways and Means documented the Administration's unorthodox approach to drafting implementing regulations to §36B.[2]

The IRS working group initially followed the statute when it began drafting regulations, providing subsidies only for insurance coverage purchased in State-established Exchanges. [3] In March 2011, however, the IRS working group deleted the language that followed the statutory mandate.[4] Even though "IRS and Treasury officials expressed concern that there was no direct statutory authority to interpret federal exchanges as an 'Exchange established by the State,'"[5] they failed to conduct a thorough legal analysis of the issue.

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[2] H. Comm. On Oversight and Govt. Reform and H. Comm. On Ways and Means, *Administration Conducted Inadequate Review of Key Issues Prior to Expanding Health Law's Taxes and Subsidies*, at 3, 113th Congress (Comm. Print Feb. 5, 2014), http://oversight.house.gov/wp-content/uploads/2014/02/IRS-Rule-OGR-WM-Staff-Report-Final1.pdf [hereinafter Joint Report]. The report is the result of briefings and hearings with key IRS and Treasury personnel, as well as *in camera* document review at the Department of Treasury.

[3] *Id.* at 5.

[4] *Id.* at 17.

[5] *Id.* at 5.

Instead, Treasury and IRS staff counsel deemed the clear command of the statutory language a "drafting oversight"[6] and recruited Department of Health and Human Service personnel to promulgate the oxymoronic "clarify[ing]" rule that *federal* exchanges were "established by *states*."[7] HHS personnel readily complied.[8]

Notwithstanding the lack of statutory authority for the proposed rule, IRS officials treated the availability and proper source of subsidies as unworthy of consideration.[9] IRS officials ignored five separate items of legislative history which showed that the IRS had no statutory authority to authorize federal exchanges. First, the legislative history made it clear that state participation in the healthcare exchanges was essential to securing enough votes to pass the ACA. [10] Second, previous Senate bills

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[6] *Id.* at 18.

[7] *Id.* (emphasis added).

[8] *Id.*; *see* Health Insurance Premium Tax Credit, 76 Fed. Reg. 50,932 (Aug. 17, 2011) ("Exchange has the same meaning as in 45 CFR 155.20.").

[9] Joint Report, *supra* note 2, at 18–19.

[10] *Id.* at 31–32. Senator Ben Nelson, of Nebraska, whose vote was critical to passage of the ACA, would not have supported a bill that provided only for a federal health care exchange. Senate Democrats viewed "the use of state-based exchanges as an effective counter to the argument that PPACA was a federal takeover of health care." *Id.* at 31 (citing *Senate Democratic Policy Comm. Fact Check: Responding to Opponents of Health Insurance Reform* (Sept. 21, 2009), *available at*

conditioned premium subsidies on state participation in order to avoid unconstitutional commandeering of the states.[11] Third, the ACA conditioned other provisions, such as the Medicaid expansion, on state cooperation.[12] Fourth, numerous comments on the final proposed Rule by Members of Congress, as well as members of the public, pointed out that §36B did not authorize subsidies for people enrolled through federal exchanges.[13] Finally, a January 2010 letter from eleven Members of the Texas Congressional delegation to House leadership and the President expressed support for a single federal exchange because the Senate bill's reliance on states with "indifferent state leadership that are unwilling or unable to administer and properly regulate a health insurance marketplace" posed a significant risk to the ACA's goal of universal health coverage.[14] This letter evidences the understanding that one of the ACA's chief goals was voluntary state participation.

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http://www.dpc.senate.gov/docs/fs-111-1-120.pdf ("There is no government takeover or control of health care in any senate health insurance reform legislation. All the health insurance exchanges, which will create choice and competition for Americans' business in health care, are run by states.")).

[11] *Id.* at 28, 33.

[12] *Id.* at 26–27.

[13] *Id.* at 20–23.

[14] *Id.* at 33.

The office of the IRS chief counsel, who is a presidential appointee, eventually drafted a memo announcing *ipse dixit* that subsidies were available to those enrolled in both state and federal exchanges.[15] Before adopting the final proposed Rule, Treasury officials apparently sought a legal analysis whether their proposed Rule could be justified under the *Chevron* deference doctrine.[16] Two members of the initial drafting group "could not remember ever working on a previous rule where *Chevron* was discussed prior to the publication of the final rule," with one member stating that "considering *Chevron* prior to the promulgation of a final rule was very unusual."[17]

C. The Administration's Indispensable Expert, Jonathan Gruber, Understood Congress's Intent That Tax Credits Were To Be Available Only Through State-Created Health Care Exchanges.

IRS and Treasury Officials requested HHS's complicity in changing the law yet apparently could not be bothered to consult with HHS's own indispensable expert, Jonathan Gruber, to ascertain Congress's intent with respect to §36B. Gruber understood that the law authorized subsidies only for insurance coverage purchased on state exchanges.

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[15] *Id.* at 17.

[16] *Id.* at 21–22.

[17] *Id.* at 22.

Gruber's stature as the architect of the ACA was well documented and widely acknowledged.[18] One month after President Obama took office, HHS released a sole-source solicitation titled, *Technical Assistance in Evaluating Options for Health Reform* that identified Gruber as the "only . . . responsible source" for the work HHS required in creating a health care law, and certifying that there was no other source that would "satisfy HHS requirements."[19] HHS went on to call Gruber "uniquely positioned to provide the analytic work

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[18] *See generally* Catherine Rampell, *Academic Built Case for Mandate in Health Care Law*, NY TIMES, Mar. 28, 2012, http://www.nytimes.com/2012/03/29/business/jonathan-gruber-health-cares-mr-mandate.html?pagewanted=all; *see also* Sarah Kliff, *Jon Gruber on Obamacare, premium support and health policy dreams*, WASH. POST, May 21, 2012, http://www.washingtonpost.com/blogs/wonkblog/post/jon-gruber-on-obamacare-premium-support-and-health-policy-dreams/2012/05/21/gIQAT2EofU_blog.html; Erika Eichelberger, *Conservatives Insist Obamacare Is On Its Deathbed*, MOTHER JONES, Jan. 24, 2013, http://www.motherjones.com/politics/2013/01/obamacare-exchanges-conservative-cato-freedomworks; *10 Obamacare Questions Answered by MIT Economist Jonathan Gruber*, THE DAILY BEAST, Mar. 29, 2012, http://www.thedailybeast.com/articles/2012/03/29/10-obamacare-questions-answered-by-mit-economist-jonathan-gruber.html.

[19] *Solicitation Number: AES2009 – Technical Assistance in Evaluating Options for Health Care Reform*, Federal Business Opportunities, (Feb. 25, 2009), https://www.fbo.gov/index?s=opportunity&mode=form&id=239a1e94d4f22683c9cf64fd2ddcf9e0&tab=core&tabmode=list&=.

[which the Assistant Secretary] requires" and stated that his unique proprietary microeconomic model "strongly positions him to meet HHS' requirements the most efficiently" for "legislative proposals to be put forth for Congressional consideration as soon as possible."[20]

Gruber himself has on several occasions explicitly claimed to be an architect of the ACA.[21] "I know more about this law than any other economist," Gruber stated.[22] The Speaker of the House and White House officials heavily quoted and relied on Gruber during the ACA debates on the floor of the Senate and in statements to the press.[23]

White House and Congressional leaders drew extensively on Gruber's expertise. Mr. Gruber attended numerous meetings[24] with lawmakers and

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[20] *Id.*

[21] AmericanCommitment, *Gruber MIT lecture: "I helped write it,"* YOUTUBE (Dec. 10, 2014), https://www.youtube.com/watch?v=JvZs9w824CE&list=UUukNcfwOgI4F4T-H5rn6P3Q.

[22] Rampell, *supra* note 17.

[23] Jane Hamsher, *How the White House Used Gruber's Work to Create Appearance of Broad Consensus*, HUFFINGTON POST, Mar. 18, 2010, http://www.huffingtonpost.com/jane-hamsher/how-the-white-house-used_b_421549.html.

[24] John Fund, *Gruber's Deception*, NATIONAL REVIEW, Nov. 17, 2014, http://www.nationalreview.com/article/392787/grubers-deception-john-fund.

the President as they crafted and pushed the bill through Congress.[25] The White House cited Mr. Gruber five times in blog post releases about health care reform.[26] In one of these releases, Gruber was cited for a report he created "based on data from the

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[25] Kelley Beaucar Vlahos, *Despite Dem Claims, Trash-Talking Gruber Was Well Paid Adviser for Obamacare*, FOX NEWS, Nov. 14, 2014, http://www.foxnews.com/politics/2014/11/14/despite-dem-claims-trash-talking-gruber-was-well-paid-adviser-for-obamacare-and/?cmpid=cmty_twitter_fn.

[26] Jesse Lee, *Word from the White House: Another Day, Another Self-serving Analysis from the Insurance Industry*, WHITE HOUSE BLOG (Oct. 15, 2009), http://www.whitehouse.gov/blog/Word-from-the-White-House-Another-day-Another-Self-serving-Analysis-from-the-Insurance-Industry; Jesse Lee, *Word from the White House: Objective Analysis Shows Reform will Help Small Businesses, Lower Premiums for American Families*, WHITE HOUSE BLOG (Nov. 4, 2009), http://www.whitehouse.gov/blog/2009/11/04/word-white-house-objective-analysis-shows-reform-will-help-small-businesses-lower-pr; Jesse Lee, *Word from the White House: Talking Points: Reform Opponents' Pre-Determined "Study"*, WHITE HOUSE BLOG (Nov. 16, 2009), http://www.whitehouse.gov/blog/2009/11/16/word-white-house-talking-points-reform-opponents-pre-determined-study; Jesse Lee, *Word from the White House: Hospitals Reaffirm Commitment to America's Seniors*, WHITE HOUSE BLOG (Nov. 17, 2009), http://www.whitehouse.gov/blog/2009/11/17/word-white-house-hospitals-reaffirm-commitment-americas-seniors; Nancy-Ann DeParle, *MIT Economist Confirms Senate Health Reform Bill Reduces Costs and Improves Coverage*, WHITE HOUSE BLOG (Nov. 29, 2009), http://www.whitehouse.gov/blog/2009/11/29/mit-economist-confirms-senate-health-reform-bill-reduces-costs-and-improves-coverage.

non-partisan Congressional Budget Office." [27] The White House's characterization of Gruber and the CBO as the leading authorities highlighted Gruber's role in creating and drafting the ACA.

Gruber worked both as an advisor to the CBO and with Congress on drafting "the specifics of the legislation."[28] He served on a "loan out" basis from the White House.[29] Former Speaker Pelosi praised Gruber's analysis of the ACA, quoting it along with the CBO as authoritative sources on the potential costs and impact of the law on health care costs and on the economy generally. [30] Speaker Pelosi also quoted Gruber's analysis on her official website in answer to various critics that there was clear, independent proof of the economic soundness of the legislation. [31] Senate Majority Leader Harry Reid

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[27] DeParle, *supra* note 26.

[28] Rampell, *supra* note 17.

[29] *Id.*

[30] Aaron Blake, *Nancy Pelosi says she doesn't know who Jonathan Gruber is. She touted his work in 2009*, WASH. POST, Nov. 13, 2014, http://www.washingtonpost.com/blogs/the-fix/wp/2014/11/13/nancy-pelosi-says-she-doesnt-know-who-jonathan-gruber-is-she-touted-his-work-in-2009/.

[31] Speaker Nancy Pelosi, *Health Insurance Reform Mythbuster – 'Health Reform and Insurance Premiums,'* SPEAKER.GOV (Dec. 1, 2009), https://web.archive.org/web/20100202225120/http://www.speaker.gov/newsroom/factcheck?id=0142 (Internet Archive of Speaker's Website).

read Gruber's analysis on the Senate floor and called him "one of the most respected economists in the world."[32]

Gruber thus spoke as an indisputable authority when he declared that the subsidy provision was intentionally limited to state exchanges to induce the states to set up health care exchanges. Trading on his extensive and unparalleled role in creating the ACA, he told an audience of health care policy professionals that Congress drafted the ACA to incentivize states to create and fund exchanges.[33] "What's important to remember politically about this is, if you're a state and you don't set up an Exchange, that means your citizens *don't get their tax credits.*"[34] Gruber said that this decision to limit the tax credit to buyers on state exchanges was a political calculation by the bill's drafters to encourage states to "get their act together" and create health care exchanges so that fewer people would be thrust on the "Federal Backstop," an exchange for which there was no tax credit.[35] Gruber also opined that the reason the federal government had been slow to set

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[32] Hamsher, *supra* note 23.

[33] NoblisNetwork, *Jonathan Gruber at Noblis – January 18, 2012*, YOUTUBE (Jan. 20, 2012), https://www.youtube.com/watch?v=GtnEmPXEpr0#t=1928 (portions quoted in this brief are found from 31:25-32:25).

[34] *Id.* (Emphasis added).

[35] *Id.*

up the "Backstop" exchange was in order to "squeeze the states" into setting up their exchanges.

D. The IRS Regulations are Part of the Administration's Pattern and Practice of Suspending or Rewriting Portions of the Affordable Care Act.

The Administration's attempt to rewrite the ACA via the ultra vires IRS regulations is just one instance of the Administration's practice of rewriting ACA provisions that, in the Administration's view, have become politically inexpedient. To date, the Administration has made twenty-four significant changes to the law, [36] none of which Congress authorized either in the ACA or in subsequent legislation. *Cf., e.g., Clinton*, 524 U.S. at 476–77 (Breyer, J., dissenting) (citing examples of statutes granting conditional authorization to the President to suspend enforcement of statutes). Notably, the Administration has suspended the effective date of several key ACA provisions, including suspending the employer mandate first for all employers,[37] and then again for midsize employers.[38]

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[36] Tyler Hartsfield & Grace-Marie Turner, *42 Changes to ObamaCare...So Far*, GALEN INSTITUTE (Nov. 6, 2014), http://www.galen.org/newsletters/changes-to-obamacare-so-far/.

[37] The employer mandate was scheduled to become effective January 1, 2014. The Administration rewrote the effective date to become January 1, 2015. The employer mandate delay was initially announced by the Treasury Department. Mark J. Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEPARTMENT OF THE TREASURY (Jul.

Similarly, in response to public outcry over the Administration's false assurances that "if [Americans] had a plan that they liked, they could keep it," the Administration twice suspended enforcement of the provision requiring health insurers to cancel noncompliant plans.[39] In another

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2, 2013), http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx. On July 2, 2013, the department stated that "[t]he Administration is announcing that it will provide an additional year before the ACA mandatory employer and insurer reporting requirements begin." *Id.* After this statement, the IRS issued Notice 2013-45.

[38] The Administration extended the effective date two years, from January 1, 2014 to January 2016. *Treasury and IRS Issue Final Regulations Implementing Employer Shared Responsibility Under the Affordable Care Act for 2015*, U.S. DEPARTMENT OF THE TREASURY (Feb. 10, 2014), http://www.treasury.gov/press-center/press-releases/Pages/jl2290.aspx. This suspension was later reflected in a regulation in the Federal Register that provided "transition relief for applicable large employers with fewer than 100 full-time employees." *Shared Responsibility for Employers Regarding Health Coverage*, 79 Fed. Reg. 8544, 8574 (Feb. 12, 2014).

[39] *See Statement by the President on the Affordable Care Act*, WHITEHOUSE.GOV (Nov. 14, 2013), http://www.whitehouse.gov/the-press-office/2013/11/14/statement-president-affordable-care-act.

> [S]tate insurance commissioners still have the power to decide what plans can and can't be sold in their states. But the bottom line is, insurers can

significant change, Congress authorized federal high risk pools and money to support them, but the Administration stopped enrollment in the pools and used the money instead for other purposes, including advertising to promote the ACA.[40] Additionally, the Administration awarded subsidies to Members of Congress and their staffs for purchasing insurance

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> extend current plans that would otherwise be canceled into 2014, and Americans whose plans have been canceled can choose to re-enroll in the same kind of plan.

Id.; *see also* Letter from Gary Cohen, Director, Center for Consumer Information and Insurance Oversight, to Insurance Commissioners (Nov. 14, 2013), *available at* http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF (giving state insurance commissioners permission to allow individuals to keep their original health insurance plans even if those plans would normally be cancelled under the ACA); *HHS Notice of Benefit and Payment Parameters for 2015*, 79 Fed. Reg. 13,744, 13,753, 13,786 (Mar. 11, 2014); Bulletin from Gary Cohen, Director, Center for Consumer Information and Insurance Oversight 2–3 (Mar. 5, 2014), *available at* http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf.

[40] *See* Letter from Richard Popper, Director, Insurance Programs Group, to Pre-Existing Condition Insurance Plan Contractors (Feb. 15, 2013), *available at* http://www.ihatoday.org/uploadDocs/1/pcipprogramsuspension.pdf (when enrollment ended, the allocated money that had not yet been spent was used for advertising ACA enrollment and other things); *see also* Grace-Marie Turner, *The Real ObamaCare Test is Coming*, GALEN INSTITUTE (Aug. 22, 2013), http://www.galen.org/topics/the-real-obamacare-test-is-coming/.

on the health care exchanges, even though ACA does not authorize such subsidies.[41] The Administration also canceled scheduled cuts to Medicare Advantage.[42]

The Administration's repeated disregard for key statutory provisions and deadlines strips Congress of its constitutional prerogative to specify when and how the laws it enacts become effective. If upheld, the IRS regulations would manifestly inflict a "severe blow" to the separation of powers, *Util. Air Regulatory Grp.*, 134 S. Ct. at 2446. The regulations "increase[ ] the power of the President beyond what the Framers envisioned" and "compromise[ ] the political liberty of our citizens, liberty which the separation of powers seeks to secure." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring).

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[41] *See* 5 C.F.R. §§ 890.102(c)(9), 890.501(h) (current through Dec. 2014).

[42] The administration cancelled scheduled cuts to Medicare Advantage on April 7, 2014. Hartsfield & Turner, *supra* note 35. The organization responsible for initiating this cancellation is the Centers for Medicare & Medicaid Services (CMS). *See* Press Release, CMS, CMS Ensures Higher Value and Quality for Medicare Health and Drug Plans (Apr. 7. 2014), *available at* http://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2014-Press-releases-items/2014-04-07.html (CMS stated that it would "use its authority, provided by the health care law, to protect Medicare Advantage enrollees from significant increases in cost or cuts in benefits.").

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment below.

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